
Political Event Contract Update: Previewing Tomorrow’s Kalshi v. CFTC Appellate Court Hearing

September 18, 2024

As we have previously noted, the Commodity Futures Trading Commission (CFTC) continues to face legal challenges to its regulatory approach to political event contracts.¹ The past two weeks have seen a flurry of activity in the United States District Court for the District of Columbia (District Court) and the United States Court of Appeals for the District of Columbia Circuit (Circuit Court). Currently, based on a decision by the District Court, political event contracts appear to be permitted under the Commodity Exchange Act, but a judicial ruling is pending appellate court review, and the Circuit Court will hear oral arguments on the CFTC’s emergency appeal to stay the District Court ruling tomorrow (Thursday, September 19). The CFTC remains deeply involved in litigation in two circuits, with litigation ongoing in both.²

At stake is whether KalshiEx LLC (Kalshi), a designated contract market (DCM), can list political event contracts for trading between now and the November 5 elections. From the CFTC’s perspective, this case will determine whether there will be “election gambling” on US futures markets.

To preview tomorrow’s hearing, this alert summarizes the recent developments in this case. We cover the District Court’s order and decision, as well as the actions taken by Kalshi, the CFTC, and

¹ See Client Alert, WilmerHale, CFTC, 5th Circuit Upend the Future of Prediction Markets (Oct. 3, 2023), <https://www.wilmerhale.com/insights/client-alerts/20231003-hard-to-predict-cftc-5th-circuit-upend-the-future-of-prediction-markets>; see also Client Alert, WilmerHale, Divided CFTC Releases “Gaming” Event Contract Rule Proposal (May 16, 2024), <https://www.wilmerhale.com/insights/client-alerts/20240516-divided-cftc-releases-gaming-event-contract-rule-proposal>.

² See *Clarke v. Commodity Futures Trading Commn*, 74 F.4th 627, 633 (5th Cir. 2023) (where the court held that the CFTC’s rescission of its no-action letter, which permitted trading on political event contracts by PredictIt, was likely arbitrary and capricious, warranting a preliminary injunction). Following the decision, the lower court subsequently enjoined the CFTC from taking any action to preclude trading of PredictIt Market contracts “until 90 days after a final, not further appealable, judgment is entered in the matter.” See *Clarke v. Commodity Futures Trading Commn*, No. 1:22-CV-909-DAE, 2023 WL 7272364, at *2 (W.D. Tex. Sept. 25, 2023).

the courts following the District Court's decision, and we discuss the potential implications for future event contract markets and market participants. The WilmerHale Futures & Derivatives Group continues to monitor the ongoing litigation and related developments closely, and we remain available to address any questions or concerns you have.

Recent Developments

On Friday, September 6, 2024, the District Court granted Kalshi's motion for summary judgment and denied the CFTC's cross-motion for summary judgment (the Summary Judgment Order).³ The immediate effect of Judge Jia Cobb's decision would have been to allow Kalshi to begin live trading of political event contracts, specifically a contract that would enable participants to take positions on which political party would control the US House of Representatives and which would control the US Senate (Congressional Control Contracts). The District Court concluded that the CFTC's September 2023 order (CFTC Order), which disapproved a certification by Kalshi pursuant to CFTC Regulation 40.2 related to the Congressional Control Contracts, exceeded its statutory authority. Specifically, the District Court held that Kalshi's contracts do not involve unlawful activity or gaming; rather, they involve elections, which are neither.

Following the Summary Judgment Order, there was a flurry of activity by both parties to reach a resolution—Kalshi seeking to begin offering trading of the Congressional Control Contracts, and the CFTC seeking to prevent the contracts from going live. In a September 12 hearing on the CFTC's emergency motion to stay the Summary Judgment Order, Judge Cobb denied both the emergency motion to stay and the CFTC's oral motion for stay pending appeal, prompting Kalshi to launch its Congressional Control Contracts shortly after the hearing. Later that same day, the CFTC filed a notice of appeal and an emergency motion to stay the Summary Judgment Order in the Circuit Court.⁴ At 8:25 p.m. Eastern time on September 12, the Circuit Court ordered that the District Court's Summary Judgment Order be administratively stayed pending appeal, prompting Kalshi to pause its live contracts "pending court process."⁵

Background

At issue before the District Court was the legality of a specific type of financial derivative, an event contract. Since 2020, the CFTC had authorized Kalshi to list event contracts for public trading as a

³ See *KalshiEX LLC v. Commodity Futures Trading Commission* (CFTC), Civil Action No. 23-3257 (JMC), (D.D.C. Sept. 12, 2024) (decision related to the court's Sept. 6 order).

⁴ Per Curiam Order, ECF No. 1208661514, *KalshiEX LLC v. Commodity Futures Trading Commission*, No. 24-5205 (D.C. Cir. Sept. 12, 2024).

⁵ See "Election Betting Halted After Appeals Court Agrees to Hit the Brakes," *WALL ST. J.* (Sept. 13, 2024), <https://www.wsj.com/livecoverage/stock-market-today-dow-sp500-nasdaq-live-09-13-2024/card/election-betting-halted-after-appeals-court-agrees-to-hit-the-brakes-cOqK2B0FT4aOGmYI4LHj?mod=mhp>.

DCM. However, the dispute before the District Court concerned the Congressional Control Contracts.

On June 12, 2023, Kalshi self-certified that its Congressional Control Contracts complied with the Commodity Exchange Act (CEA) and CFTC regulations. On June 23, 2023, the CFTC commenced a review of the Congressional Control Contracts, determining that the contracts “may involve, relate to, or reference an activity enumerated” in the CEA and CFTC regulations.⁶

Under CFTC Regulation 40.11, DCMs “shall not list for trading or accept for clearing” any contract based on an excluded commodity, as defined in CEA Section 1a(19)(iv), that “involves, relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law.” CFTC Regulation 40.11 also prohibits contracts that the CFTC determines “to be contrary to the public interest.”

On September 22, 2023, the CFTC issued an order disapproving a certification by Kalshi pursuant to CFTC Regulation 40.2 (the CFTC Order).⁷ The CFTC determined that Kalshi’s Congressional Control Contracts involved gaming and unlawful activity, which are two activities enumerated in the CFTC Regulation 40.11.⁸ Because the CEA does not provide controlling definitions, the CFTC Order hinged on what it means for a contract to “involve” an enumerated activity and the CFTC’s interpretation of the meaning of “gaming” to determine whether Kalshi’s Congressional Control Contracts impermissibly involve gaming, an excluded commodity under the CEA. On November 23, 2023, Kalshi filed a complaint in the District Court requesting that the CFTC Order be vacated,

⁶ In recent years, the CFTC has taken several actions related to event contracts. In January 2022, the CFTC found that Polymarket, a decentralized prediction market platform, had been operating an illegal, unregistered facility for event-based binary options trading contracts without obtaining the necessary designation as a DCM or registration as a swap execution facility. The CFTC ordered Polymarket to pay a \$1.4 million civil monetary penalty and to wind down all noncompliant markets on its platform. *See* Press Release, CFTC, “CFTC Orders Event-Based Binary Options Markets Operator to Pay \$1.4 Million Penalty” (Jan. 3, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8478-22>. Polymarket subsequently ceased offering its services to US users. *See* Brady Dale, “CFTC Orders Event-Based Binary Options Markets Operator to Pay \$1.4 Million Penalty,” YAHOO: FIN. (Jan. 25, 2022), <https://finance.yahoo.com/news/polymarket-shuts-u-traders-comply-161312465.html>. In August 2022, the CFTC’s Division of Market Oversight (DMO) withdrew the 2014 no-action letter that permitted PredictIt to operate a political and economic indicator event contract market without registration as a DCM. *See* Press Release, CFTC, “CFTC Staff Withdraws No-Action Letter to Victoria University of Wellington, New Zealand Regarding a Not-For-Profit Market for Certain Event Contracts” (Aug. 4, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8567-22>. PredictIt later obtained an injunction from the Fifth Circuit Court of Appeals in response to the CFTC’s DMO’s August 2022 attempt to withdraw the 2014 no-action letter. On May 10, 2024, the CFTC proposed amendments to CFTC Regulation 40.11 that further define “gaming” contracts considered “contrary to the public interest” under Section 5c(c)(5)(C) of the CEA. *See* <https://www.cftc.gov/PressRoom/PressReleases/8907-24>; *supra* note 1.

⁷ In the Matter of the Certification by KalshiEX LLC of Derivatives Contracts with Respect to Political Control of the United States Senate and United States House of Representatives, available at <https://www.cftc.gov/sites/default/files/filings/documents/2023/orgkexkalshiorsersig230922.pdf>.

⁸ *See* also 7 U.S.C. § 7a-2(c)(5)(C)(i).

asserting that the CFTC's Order exceeded its statutory authority under the CEA and is arbitrary, capricious, and otherwise contrary to law.⁹

District Court's Decision and Analysis

Judge Cobb of the District Court reviewed the CFTC Order under the Administrative Procedure Act (APA) to determine if it is "arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence." When reviewing agency action under the APA, Judge Cobb noted, the traditional summary judgment standard provided in Federal Rule of Civil Procedure 56 does not apply. Instead, the court considers "the entire case on review [as] a question of law."¹⁰

Judge Cobb stated that the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*¹¹ overruled *Chevron*¹² deference, and accordingly, the District Court relied on "traditional tools of statutory construction" to resolve the parties' motions.¹³ Notably, because the CFTC did not contend that it should do so, the District Court held that it did not need to address the scope of deference owed to the CFTC in the wake of *Loper Bright*.

First, the District Court held that "gaming," as used in CFTC Regulation 40.11, refers to playing games or playing games for stakes. Kalshi argued that the term "gaming" in the CEA must be "defined by reference to games."¹⁴ The CFTC asserted that "gaming" is synonymous with "gambling" and should therefore be defined accordingly. After considering the CEA's structure and context, the District Court reasoned that the ordinary meaning of the term "gaming" is consistent with Kashi's position. In rejecting the CFTC's more expansive definition of "gaming" (or "gambling"), the District Court explained that if it were to accept the CFTC definition, all event contracts would be subject to review under the CFTC regulation because they all involve purchasing some contingent event with the hope of receiving a payoff. The District Court determined that this definition conflicts with CFTC authority to review event contracts only if they involve specific,

⁹ Complaint, ECF No. 1, *KalshiEX LLC v. Commodity Futures Trading Commission* (CFTC), CV No. 23-3257 (JMC), (D.D.C. Sept. 12, 2024). In a joint motion for entry of scheduling order, the parties agreed to a proposed schedule that requested the Court to aim to rule on the cross motions by September 6, 2024. *See* Joint Mot. for Entry of Scheduling Order and for Other Relief, ECF No. 14, *Kalshi v. CFTC*, No. 23-3257 (JMC), (D.D.C. Sept. 12, 2024). The date was proposed with the understanding that "meaningful relief for the upcoming election cycle is only possible if the case is adjudicated reasonably in advance of the 2024 congressional elections, with sufficient time to seek expedited interim relief in the Court of Appeals if necessary." *Id.* The District Court granted the joint motion with the agreed upon scheduling order on November 30, 2023. Scheduling Order, ECF No. 15, *Kalshi v. CFTC*, No. 23-3257 (JMC), (D.D.C. Sept. 12, 2024).

¹⁰ *See supra* note 3 at 6.

¹¹ *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2263 (2024).

¹² *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984), overruled by *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

¹³ *See supra* note 3 at 7 (citing 144 S. Ct. 2244, 2268 (2024)).

¹⁴ *Id.* at 14.

enumerated activities under the CEA. Judge Cobb underscored that the CFTC Order’s “discussion of a more limited definition of gambling (and thus gaming) as staking something of value upon the outcome of contests of others” should not displace the plain and ordinary meaning of “gaming” that the District Court recognized.¹⁵

Second, the District Court recognized that “involve” should be broadly construed, and “a contract or transaction ‘involves’ an enumerated activity if the event being offered and traded as part of that contract or transaction relates to that activity.”¹⁶ Because the District Court found that Kalshi’s Congressional Control Contracts do not involve unlawful activity or gaming, it declined to consider whether such contracts are contrary to the public interest.¹⁷ The District Court then granted Kalshi’s motion for summary judgment.

Actions Following the District Court’s Order and Decision

After the District Court’s decision, both parties acted swiftly. Kalshi aimed to launch Congressional Control Contracts, while the CFTC sought to block the political event contracts to prevent alleged harms to election integrity. The parties’ activities prompted similarly swift responses from the courts. These events are described in further detail below:

- On Friday, September 6, 2024, after the District Court issued its Summary Judgment Order, the CFTC filed an emergency motion to stay.¹⁸ The District Court indicated that a memorandum opinion related to its order would follow.
- On Sunday, September 8, 2024, Kalshi filed its opposition to the emergency motion to stay.¹⁹
- On Monday, September 9, 2024, the CFTC completed briefing on the issue by filing its reply to the opposition to the motion.²⁰
- On Monday, September 9, 2024, the District Court issued a minute order scheduling a hearing for Thursday, September 12, 2024, and ordering a temporary administrative stay of its Summary Judgment Order granting Kalshi’s motion for summary judgment.
- On the morning of Thursday, September 12, 2024, the Court issued its memorandum opinion providing its reasoning to support its Summary Judgment Order.²¹ The District

¹⁵ *Id.* at 17.

¹⁶ *Id.* at 26.

¹⁷ *Id.*

¹⁸ See Def. Emergency Mot. to Stay the Court’s Decision Until 14 Days After the Issuance of the Forthcoming Mem. Op., ECF No. 48 at note 1, *Kalshi v. CFTC*, No. 23-3257 (JMC).

¹⁹ Opp’n to Def. Emergency Mot. for Stay, ECF No. 49, *Kalshi v. CFTC*, No. 23-3257 (JMC).

²⁰ Def. Reply in Supp. of Emergency Mot. for a Stay, ECF No. 50, *Kalshi v. CFTC*, No. 23-3257 (JMC).

²¹ *Supra* note 3.

Court also heard arguments on the CFTC's emergency motion to stay its Summary Judgment Order. During the hearing, the District Court denied both the CFTC's emergency motion to stay and the CFTC's oral motion for stay pending appeal.

- Shortly after the hearing on September 12, Kalshi launched its Congressional Controls Contract. At the same time, the CFTC filed a notice of appeal to the Circuit Court and an emergency motion to stay the underlying Summary Judgment Order pending appeal.²² Later that day, Kalshi filed a response opposing the entry of an administrative stay.²³
- At 8:25 p.m. Eastern time on September 12, the Circuit Court ordered that the District Court's Summary Judgment Order be administratively stayed pending appeal.²⁴
- As of 11:30 p.m. Eastern time on September 12, Kalshi paused its Congressional Control Contracts citing a "pending court process."
- On September 13, 2024, Kalshi filed its response in opposition to the CFTC's motion to stay pending appeal.²⁵
- On September 14, 2024, the CFTC filed its reply to Kalshi's opposition brief.²⁶
- On September 16, 2024, the Circuit Court scheduled oral argument on the CFTC's emergency motion to stay for Thursday, September 19, 2024 before Judges Millett, Pillard, and Pan.²⁷

Next Steps and Broader Implications

Procedurally, the Circuit Court will first consider the CFTC's emergency motion for stay of the District Court's decision pending appeal. Kalshi and the CFTC have already submitted their respective response and reply briefs, and given the short time until the U.S. elections that are the subject of Kalshi's Congressional Control Contracts, we expect the Circuit Court will make a decision on an expedited timeline. The CFTC contends in its brief that is likely to succeed on the merits and points to irreparable harm of incentivizing misinformation or using the markets to distort

²² Not. of App., ECF No. 52, *Kalshi v. CFTC*, No. 23-3257 (JMC); Emergency Mot. to Stay, ECF No. 1208661487, *Kalshi v. CFTC*, No. 24-5205.

²³ Opp'n to Request for Temporary Administrative Stay, ECF No. 1208661496, *Kalshi v. CFTC*, No. 24-5205.

²⁴ See *supra* note 4.

²⁵ Opp'n to Defendant-Appellant's Mot. for Stay Pending Appeal, ECF No. 1208662007, *Kalshi v. CFTC*, No. 24-5205.

²⁶ Reply in Supp. of Mot. for Stay Pending Appeal, ECF No. 1208662063, *Kalshi v. CFTC*, No. 24-5205

²⁷ Per Curiam Order, ECF No. 2074792, *KalshiEX LLC v. Commodity Futures Trading Commission* (CFTC), No. 24-5205 (D.C. Cir. Sept. 16, 2024).

electoral perceptions.²⁸ Kalshi argues in its brief that the Circuit Court should reject the stay pending appeal because, as the District Court recognized, the CFTC is unlikely to succeed on the merits and the balance of equities favor Kalshi, which would be deprived of the fruits of “an enormous investment in these time-limited markets.”²⁹ Should the Circuit Court decline to impose a stay, Kalshi could decide—as it did shortly after the District Court’s hearing on the CFTC emergency motion—to immediately make Congressional Control Contracts available to trade. Other market participants could also decide to make similar contracts available.³⁰

The Circuit Court will then turn to review of the District Court’s decision. Should the Circuit Court agree with the lower court, it would allow regulated exchanges like Kalshi to offer event contracts based on political outcomes to US market participants and could pave the way for a broader range of political prediction contracts in the future. It is important to note that, as Judge Cobb stated,

²⁸ See *supra* note 22. The CFTC argues that the District Court (1) rejected the plain meaning of “involve” because it misconstrued that the word “involve” can only be referring to the underlying commodity or subject of the transaction, not the contracts or transactions as a whole; (2) and applied an arbitrarily narrow definition of “gaming,” because it ignored the definition from a dictionary cited by the District which listed “gambling” as a synonym for “gaming” and the CEA’s legislative history regarding Congressional intent “to prevent . . . gambling through futures markets”; (3) and misinterpreted “unlawful activity” because the CFTC “properly determined that the election contracts involved—or related in some way . . . to unlawful activity because the contracts undermined those state interests in protecting elections.” Reply in Supp. of Mot. for Stay Pending Appeal, ECF No. 1208662063, *Kalshi v. CFTC*, No. 24-5205 at 2-5, 5-6, 8-9. The CFTC asserted that it would be irreparably harmed absent a stay and the public interest weighs in favor of a stay, emphasizing that the CFTC Order provided “extensive findings about adverse effects posed by the [Congressional Control] Contracts on election integrity or the perception of election integrity[,]” namely “monetary incentives to vote for particular candidates, incentivize the spread of misinformation in order to influence the markets, or incentivize the use of the market to influence perceptions about elections.” *Supra* note 22 at 19. Finally, the CFTC refutes Kalshi’s argument about being harmed by being unable to offer political event contracts during this litigation, while other competitors like Polymarket operate in the market. *Id.* at 22. The CFTC asserts that “[n]o registered DCM lawfully offers political event contracts in the United States,” and therefore Kalshi is not similarly situated to other platforms that offer political event contracts and does not suffer harm. *Id.* at 22-23.

²⁹ See *supra* note 25 at 3. Kalshi argues that “an event contract ‘involves’ unlawful activity if the event relates to an illegal act” and “Kalshi’s contracts involve elections (and politics, congressional control, and other related topics)—not illegal activities.” *Id.* at 10-11. Therefore, Kalshi contends, the District Court “adopted this event-focused interpretation of the statute [and the word involve] in part because that is the only interpretation that works for the neighboring enumerated activities—terrorism, assassination, and war.” *Id.* at 11-12. Kalshi further asserted that the District Court’s interpretation of the word gaming squares with the ordinary meaning because “Kalshi’s contracts are not contingent on a game, so they do not fall within this exception” in the CEA. *Id.* at 15-18. As to irreparable harm, Kalshi contends the CFTC’s arguments supporting harm to the CFTC or serving the public interest are undercut by the “longstanding, continuing operation of other election-prediction markets” including those currently within the US election-prediction market and “widely known to be used by U.S. traders, even if such cases are technically forbidden.” *Id.* at 19-23. Kalshi provides a declaration from its CEO to support that it will be harmed by being deprived of substantial revenue and being prevented from recouping its investment in developing the Congressional Control Contracts at issue. *Id.* at 23-24.

³⁰ Shortly following the District Court’s ruling, trading platform Interactive Brokers announced plans to “launch a market where investors can bet on the outcome of the presidential election.” See “Election Betting Is Going Mainstream After Major Brokerage Gets on Board,” WALL ST. J. (Sept. 12, 2024), <https://www.wsj.com/finance/election-betting-is-going-mainstream-after-major-brokerage-gets-on-board-595bc9a6>.

election-prediction markets are “happening in an unregulated way” already.³¹ This observation underscores the need for clear regulatory guidance to address the existing legal ambiguities and ensure market integrity.

In the wake of the *Loper Bright* decision and facing statutory ambiguity, the District Court has chosen not to defer to the CFTC’s interpretation of the dispositive statutory terms governing event contracts, signaling a shift in the judicial approach in the post-*Chevron* landscape. Unless there is meaningful congressional action to expressly delegate discretionary authority to the CFTC, there will likely continue to be challenges to the CFTC’s authority, particularly with respect to novel products and markets.³²

³¹ Transcript of Motions Hearing, ECF No. 54 at Tr.27:1-4, *Kalshi v. CFTC*, No. 23-3257 (JMC); *supra* note 22 at 20. Polymarket, which operates an unregulated market, operates outside the United States and garnered \$473 million of trading volume in June 2024. “Should Betting on Elections Be Legal?” *N.Y. TIMES* (Sept. 14, 2024), <https://www.nytimes.com/2024/09/14/business/dealbook/betting-elections-odds.html>.

³² A number of members of Congress have expressed disapproval of political event contracts. In August 2023, Senators Merkley (D-OR), Whitehouse (D-RI), Markey (D-MA), Warren (D-MA), Van Hollen (D-MD), and Feinstein (D-CA) wrote in a letter to the CFTC that political event contracts “would profoundly undermine the sanctity and democratic value of elections.” The senators also indicated that Kalshi’s political event contracts effectively allow legal gambling on US elections. *See* <https://www.vanhollen.senate.gov/news/press-releases/van-hollen-merkley-colleagues-no-gambling-on-elections>. Numerous states, including Nevada, for example, prohibit accepting bets on the outcome of political elections; however, proponents of event contracts assert that event contracts are not gambling. Following the District Court’s ruling, Senator Merkley stated the court’s decision was “deeply damaging to the integrity of our upcoming election.” <https://www.merkley.senate.gov/merkley-ruling-to-allow-betting-on-u-s-congressional-elections-is-a-disaster-for-democracy/>.

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